tiffs were aware of the facts which were alleged to have been concealed by the defendant at the time of the issue of the policy. If they were in fact aware of such facts, as would appear more probable from the evidence taken as a whole, they were not entitled to the declaration which they asked for. This is clear from the following statement of the law in *MacGillivray* on Insurance Law, 5th edition, paragraph 903: —

"*Facts known to insurers.* It is obvious that the insurers cannot complain of having been deceived when from some other source they had knowledge of the facts which they say were not communicated. As Cockburn C.J. put it in *Bates* v. *Hewitt* (1867) L.R.2 Q.B. 595, 605, the insurers cannot set up the defence of non-disclosure, not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him. which he had present to his mind at the time he accepted the insurance. Probably even if the non-disclosure by the assured was intentional and fraudulent, the insurers cannot set aside the policy if, by reason of their knowledge, the non-disclosure did not influence their judgment."

For the reasons I have stated, I would allow this appeal, setting aside the order of court below, with costs to the appellant both here and in the court below.

**Suffian** and **Ong Hock Sim F.JJ.** concurred.

*Appeal allowed.*

Solicitors: *Murphy & Dunbar; Joseph & Son.*

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## HUSSANJAN v.
## HAJI NIK YAHYA BIN NIK DAUD & ORS.

**[O.C.J. (Ibrahim J.) June 6, 1972]**

**[Kota Bharu — Civil Suit No. 123 of 1965]**

*Land Laws — Contract — Agreement in relation to Malay Reservation land — Agreement void as being in breach of Kelantan Malay Reservations Enactment, 1930 — Land held in trust — Specific Relief (Malay States) Ordinance, 1950, s. 19 — Whether plaintiff a Malay and a native of Kelantan — Federal Constitution, arts. 89(6) and 160(2) — Evidence Ordinance, 1950 s. 115 — Estoppel by conduct.*

In this case the plaintiff prayed for a declaration that the transfer of certain lands by the first defendant be declared void and that the lands be registered in her name. She alleged that the lands had been purchased by her late husband but registered in the first defendant's name. The plaintiff's husband had successfully bid at an auction for 13 lots of land, which he bought for the plaintiff but which were registered in the first defendant's name. Subsequently the first defendant and the plaintiff made a written agreement by which the first defendant agreed to transfer the lands to the plaintiff, after approval had been obtained from the Ruler in Council. The Ruler in Council gave the approval but the first defendant only transferred 10 out of the 13 lots to the plaintiff. The first defendant alleged that the three lots of land had been given to him by the plaintiff as a gift for building a school.

The issues raised in the case were as follows: —

(1) whether the plaintiff was a Malay and a native of Kelantan at the time when the lands were bought;

(2) were the three lots registered and held in the name of the first defendant in trust for the plaintiff?

(3) was there a gift of the said three lots by the plaintiff to the first defendant for purposes of erecting a school?

(4) is the plaintiff estopped by conduct from claiming the three lots?

(5) whether the agreement dated 12 June 1949 contravenes section 12 of the Malay Reservations Enactment 1930 and is therefore null and void.

**Held:** (1) on the evidence in this case the plaintiff was not a Malay and a native of Kelantan;

(2) the transaction in this case taken as a whole was an evasion of the provisions of the Malay Reservations Enactment and the agreement of 12 June 1949 was therefore null and void;

(3) the plaintiff's claim must therefore be dismissed;

(4) on the other issues in the case, there was evidence to show that the three lots were held in trust for the plaintiff but there had been a gift of the said three lots by the plaintiff to the first defendant for purposes of erecting a school and (even assuming the gift had not been validly made) the plaintiff was estopped by conduct from claiming the three lots.

*Cases referred to:-*

(1) *Hanisah* v. *Tuan Mat* [1970] 1 M.L.J. 213.

(2) *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47.

(3) *Lee Eng Teh & Ors.* v. *Teh Thiang Seang & Anor.* [1967] 1 M.L.J. 42.

CIVIL SUIT.

*A. Wilson* for the plaintiff.

*C. O. Lim* (*Ong See Seng* with him) for the defendants.

**Ibrahim J.:** In this action the plaintiff is praying for:—

(a) A declaration that the transfers of Lot 36 Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu of 10th day of October 1957 from Nik Yahya bin Nik Daud to Tengku Zainab binti Tengku Mohamed, of 31st day of March 1958 from Tengku Zainab binti Tengku Mohamed to Nik Yahya bin Nik Daud and of 3rd day of September 1961 from Nik Yahya bin Nik Daud to Tengku Abdullah bin Tengku Ahmad and Haji Nik Yahya bin Nik Daud as Trustees of Kelantan Parents Association are void and that they be set aside and the Land Register and title rectified accordingly;

(b) An order that the said Lot 36 Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu be registered in the name of Hussanjan bt. Baharam Khan (f) alias Mrs. Fateh Mohamed;

(c) Alternatively damages for breach of trust of Lot 36, Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu, by the first defendant and the 2nd and 3rd defendants.

(d) Damages for breach of trust of Lots 843 and 845, Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu by the first defendant;

(e) Such further and other consequential reliefs as the court may deem fit; and

(f) Costs of this suit.

The following facts are not in dispute. The plaintiff was the wife of a Pakistani Muslim named Fateh Mohamed who was a retired Detective Police Inspector and who had died on 3 October 1950 (page 105 of A). On 18 May 1948 Fateh Mohamed successfully bid at a public auction 13 lots of lands belonging to the estate of Tengku Zainal Abidin ibni Sultan Mohamed III. He paid the 25% advance payments on same day (pages 6-17 of A are copies of 12 of the 13 receipts) and the balance subsequently. He had bought those 13 lots for the plaintiff but the receipts had been put in the first defendant's name and the 13 lots had also been registered on 14 November 1948 in his name because they could not be registered in her name. Fateh

Mohamed and the first defendant were good friends and Fateh Mohamed had previously bought 12 lots of lands which were also registered in the first defendant's name in respect of which the first defendant had on 15 May 1946 made a P/A in favour of the plaintiff (pages 4 and 5 of A). On 12 June 1949 the first defendant and the plaintiff made a written agreement (pages 21 to 23 of A) which incorporated what had been agreed to by the first defendant and the plaintiff's husband in respect of the 13 lots. Earlier on 20 November 1948 the first defendant had applied to the State Secretary for permission to transfer the 13 lots to the plaintiff (page 19 of A). On the advice of the State Secretary that application was withdrawn on 11 October 1949 and the plaintiff herself started to apply for permission with a letter addressed to the State Secretary dated 27 February 1950 (page 27 of A). After several applications and rejections His Highness the Ruler in Council finally gave the approval under section 13A(i) of the Malay Reservations Enactment on 21 October 1957 (page 55 of A). Only 10 lots, however, were transferred to the plaintiff by the first defendant on 31 March 1958 (pages 2 and 3 of B). The memorandum of transfer which was prepared by the clerk at the Land Office originally contained all the 13 lots but Assistant District Officer Noordin who attested the transfer and who has since died in 1967 deleted Lots 36, 843 and 845 which incidentally had already been transferred by the first defendant to Tengku Zainab on 10 October 1957 (page 53 of A). On 31 March 1958 Tengku Zainab had re-transferred Lot 36 to the first defendant (page 56 of A) and on 31 January 1960 she had transferred on 'jual janji' Lots 843 and 845 to Wan Lia bin Wan Mohamed (pages 71 and 72 of A). The first defendant had on 4 September 1961 transferred Lot 36 to the second and third defendants as trustees of the Kelantan Parents Association (page 78 of A) which in October 1957 had already started to build a school thereon. The first defendant had not paid or received any of the considerations stated in the various transfer documents in which he was a party.

According to the first defendant the three lots had been given to him by the plantiff as a gift for building a school. This is denied by the plaintiff and there is also a conflict of evidence as to what transpired at the Assistant District Officer's office particularly on the deletion of the three lots from the memorandum of transfer and also as to whether the plaintiff had objected or not to the building of the school on Lot 36. The plaintiffs contention that she is a Malay and a native of Kelantan is disputed by the defendants. There are five issues which have been agreed to by the parties at the commencement of the hearing.

According to the plaintiff (PW1) she was born a Muslim in Kampong Badak, Kelantan, in 1911 or 1918 when there was no registration authority for birth. Her father was a Pakistani Muslim who was born in Pakistan and her mother who had died 3-4 years ago was also born a Muslim in Kampong Badak. Her mother did not tell her anything about her parents except that they were Muslims born in Kelantan. On 20 December 1948 she had made a statutory declaration (page 1 of B) in which she declared her mother's nationality as Kelantan Malay. She has been speaking Malay since she had been able to speak and her parents also spoke Malay. In the house she follows Malay customs and so also did her parents.

In connection with the transfer she had gone to the Land Office together with her son (PW2) and there met the first defendant and his eldest son. She at first said that she knew when the transfer was made that only ten lots were being transferred to her and that the first defendant told her that the other three lots could not be transferred but later in her cross-examination she said that she came to know about it only when PW2 told her so after they had returned home from the office. She denied that the Assistant District Officer had deleted the three lots after she had confirmed to him that she had promised to give the three lots for the school. Subsequently she went to the first defendant's house and asked him to transfer the three lots to her but each time he told her to wait as they were only small lots. She did not know then that the three lots had already been transferred by the first defendant to someone else. After making several requests without any success she consulted a lawyer (Mr. Wrigglesworth) who on her instruction wrote a letter dated 30 September 1958 to the first defendant requesting him to transfer the three lots to her (page 58 of A). The first defendant did not reply to that letter.

PW2 told her that construction of the school had started in October 1957 and that big durian trees on the land were being cut for purpose of building the school. She had not asked for the woods from the cut durian trees. She objected to what was going on and though she herself had not seen the first defendant PW2 and her father had seen him about it at his shop and house. She had not made a gift of the three lots to the first defendant for building a school and her late husband had not told her that he had made such a gift. She denied that in 1956 the first defendant and his son Nik Hassan had come to her house and reminded her of her late husband's promise to give some lands for building a school and that she then agreed to deletion of three lots from the lots to be transferred to her in future.

The plaintiff's son (PW2) supported her contention that she is a Kelantan Malay and that her mother was also a Kelantan Malay and that they speak Malay in the house. He also supported her contention that she did not know of the deletion of the three lots from the memorandum of transfer when she executed it at the Assistant District Officer's office and that she had objected to the construction of the school on Lot 36.

According to him the first defendant, after consulting his son Nik Hassan, had told the Assistant District Officer that he would only sign for ten lots and requested him to delete three lots. He asked the first defendant why but he did not tell him the reason. The Assistant District Officer cancelled the three lots but his mother did not know that the three lots had been cancelled until he told her about it later in the house. The first defendant and the Assistant District Officer spoke to him all the time and neither of them spoke to his mother. The Assistant District Officer did not even ask his mother whether she was going to sign the

transfer document voluntarily. He did not tell her before she signed it partly because she might not agree to sign it and partly because of her blood pressure. He agreed to accept the ten lots only because they had already been there and he trusted the first defendant and he believed that he would transfer the three lots later on. He denied that Nik Hassan was not present but after Nik Hassan was called into court he agreed that Nik Hassan was not present and said that one of the first defendant's other sons was present. His mother was very annoyed when he told her about the actual transfer of only ten lots and she told him to see the first defendant. He himself went many times to see the first defendant to ask for the transfer of the three lots but the first defendant treated him as a child and put off the request. He first came to know of the transfer of the three lots to someone else about three weeks after his lawyer had written the letter of 30 September 1958 when he made enquiries from the Land Office.

He could not remember exactly when the school building was commenced on Lot 36. He first noticed that holes were being dug and some durian and other fruit trees on the lot were being cut. He told his mother about it and she requested him to see the first defendant to stop the construction. When he asked the first defendant why the trees were cut and holes dug on the land he told him that he was putting up a temporary shed. He did not know then that he was constructing a school but a few months later he noticed that a school building was erected. He discussed matter with his mother and subsequently went to see the lawyer who wrote that letter dated 30 September 1958. The construction of the school took about one year to complete and at no time did the first defendant approach his mother about it. The first defendant never mentioned to him that she had made a gift of the three lots for the school and as far as he knew his mother had not made such a gift.

The other witness called by the plaintiff is Shighu bin Mohamed Hussain (PW3), petition writer and licensed appraiser, who in September 1968 was asked by PW2 to value Lots 300 (formerly Lot 36), 310 (formerly Lot 843) and 312 (formerly Lot 845) section 19, Kota Bharu. He valued the three lots at $38,826, $3,690 and $6,255 respectively.

The first defendant (DW1), who as one of the trustees of the Kelantan Parents Association (KPA) is also the second defendant, said that he was for four years till 1949 a member of the Executive Council and that he was interested in education and intended to build a proper school building and raise funds for an Arabic School which he had started to run. Fateh Mohamed knew of this and he told him before he bought those 13 lots in 1948 that if he could hold them for him he would give him some lands on which to build a school. The 13 lots were registered in his name in trust for the plaintiff and this understanding was subsequently confirmed by the agreement he made with the plaintiff on 12 June 1949. He held the 13 lots subject to permission of the Ruler in Council being obtained. He had no intention to evade the law and he himself had applied on 22 November 1948 for the 13 lots to be transferred to plaintiff. Before making the agreement on 12 June 1949 he reminded Fateh Mohamed of his promise and he assured him that he would not break it. Soon after making the agreement he went to Mecca where he stayed for two *hajis* and while he was there Fateh Mohamed died.

After his return from Mecca his son Nik Hassan (DW2) started to run the KPA School in the Sultan Ismail College premises. He told him of the late Fateh Mohamed's promise to give some lands for building a school and they both went to see the plaintiff in her house. He told her that the late Fateh Mohamed had promised to give him some lands for the school and she agreed to keep his promise for the good of his soul. He mentioned to her the area he would like for the school and she agreed to give the three lots which he asked. He could not remember the lot numbers and though he told her the situation and cultivation of the three lots he could not say whether she actually knew those particular lots. The plaintiff's gift was connected with Fateh Mohamed's promise made earlier. Fateh Mohamed did not specify that the lands he promised to give would be used solely for an Arabic School. Even before he went to Mecca he had already started an English School and Fateh Mohamed agreed to give the lands for an English School. He had not asked for Fateh Mohamed's promise to be included in the agreement he made with the plaintiff because the particular lots had not yet been specified then. He had transferred the three lots to Tengku Zainab on 10 October 1957 as security for purchase of a piece of her land in Jalan Langgar for the purpose of building an Arabic School. Though Tengku Zainab had subsequently been paid the purchase price in full she had only retransferred Lot 36 to him and transferred the other two lots on 'jual janji' to another person.

A wooden block of classrooms was constructed on Lot 36 after he met PW1 and a brick building was constructed thereon after Tengku Zainab had re-transferred it to him on 31 March 1958. The plaintiff who knew of the construction never objected to it. To construct the school some durian and other fruit trees had to be cut and the woods were given to the plaintiff. He did not ask for the plaintiff's permission when construction of the school was started in 1957. PW2 knew of it as he came to the site when the school was being constructed.

When PW2 informed him that approval had been obtained he told him that he had transferred the three lots to Tengku Zainab and that they would be excluded from the transfer form. The three lots were however included in the transfer form and before he executed it he told both the plaintiff and the Assistant District Officer that the plaintiff had agreed to give the three lots to him for the school. The Assistant District Officer asked the plaintiff if it was true and she replied that it was. The Assistant District Officer cancelled the three lots in the transfer form. His son Nik Hassan was not present then nor was any of his other sons. About one month later the plaintiff asked for the transfer of the three lots.

Nik Hassan bin Nik Yahya (DW2) who has been a Senator since 1957 and the President of the KPA

since its establishment in 1953 supported his father's evidence regarding the gift made by the plaintiff when they visited her in her house and the non-objection by the plaintiff to the construction of the school by the KPA. When KPA started to build the wooden building in 1957 some durian trees on the land were cut down and the tree cutter reported to him that plaintiff had asked for the woods. No one objected to construction of both wooden and brick buildings. He did not get anything in writing from plaintiff before KPA started to build the school and he did not tell plaintiff that KPA was building a school on the land. There is nothing in the school to show that the school site was a gift from Fateh Mohamed.

We Sue Hong (DW3) who has been Honorary Treasurer of KPA for the last 15 years produced the balance sheet and income and expenditure account of KPA for the year ended 31 December 1961 (exh: D7) which shows that the KPA had spent about $38,000 on the wooden school and about $40,000 on the brick school building. Lot 36 however had not been included as asset of KPA in D7.

The third defendant Tengku Abdullah bin Tengku Ahmad (DW4) who first became one of the trustees of the KPA in 1960 said that Lot 36 was transferred by the first defendant to him and the second defendant as trustees of the KPA on 3 September 1961 (page 78 of A). The first defendant told him that it was given by Fateh Mohamed to him for a school.

I will now deal with the various issues.

*Issue No. 1:*

Whether the plaintiff was a Malay and a native of Kelantan at the material time *i.e.* when the lands were bought.

Under Article 160(2) of the Federal Constitution:

" 'Malay' means a person who professes the Muslim religion, habitually speaks the Malay language, conforms to Malay customs and —

(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or

(b) is the issue of such a person;"

For the purposes of "Malay Reservation", however, Article 89(6) of the said Constitution provides as follows: —

".... 'Malay' includes any person who, under the law of the State in which he is resident, is treated as a Malay for the purposes of the reservation of land."

and under section 3(i) of the Malay Reservations Enactment 1930 (Kelantan Enactment No. 18/30):

" 'Malay' means a person belonging to any Malayan race who speaks any Malayan language and professes the Mohammedan religion; ...."

Under section 2 of the Land Enactment 1938 (Kelantan Enactment No. 26 of 1938):

" 'native of Kelantan' means a person who falls within any of the following classes: —

(a) any person born in Kelantan whose father was a Malay;

(b) any person born in Kelantan whose mother was a Malay and whose father was a Muslim;

(c) any person wherever born whose father was a Malay born in Kelantan;

(d) any person wherever born both of whose parents were Malays and who has resided at least 15 years in Kelantan;

(e) any person who was born in Kelantan and whose father was also born in Kelantan."

It is submitted by counsel for the plaintiff that since the defendants, in order to raise the defence that the alleged trust is null and void under the Malay Reservations Enactment, have disputed the plaintiff's averment that she is a Malay and a native of Kelantan, the onus is on the defendants to prove that she is not. I agree with this contention for section 103 of the Evidence Ordinance (No. 11 of 1950) provides that

"103. The burden of proof as to any particular facts lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Again, in *Hanisah* v. *Tuan Mat*[1] where the respondent had obtained a declaration that the transfer of certain land in Kelantan to the appellant was null and void as the appellant was not a Malay, Suffian F.J. at page 214, in allowing the appeal, said: —

"There was no oral or documentary evidence in these proceedings. There were only the affidavits of the parties, each flatly contradicting the other. Bearing in mind that it was for Tuan Mat, the respondent, to satisfy the court that Hanisah is not a Malay and not a native of Kelantan, I do not think that the evidence produced by him can be said to do so."

Though in her statutory declaration dated 20 December 1948 the plaintiff had declared that her mother was a Kelantan Malay and in her evidence given at the hearing she claimed to be both a Malay and a native of Kelantan there is an abundance of evidence adduced that she and also her husband and son had held herself out to be not so. The various letters in A and the recital to the agreement (page 21 of A) clearly stated that she was not a native of Kelantan. It is also quite clear that the arrangement by which the 13 lots which were bought by her husband for her had been registered in the name of first defendant had been made because the plaintiff and her husband believed that she was neither a native of Kelantan nor a Malay and in paragraph 4 of her letter dated 11 August 1954 (page 42 of A) she had in no uncertain terms said that:

"Both my husband and myself including all our children, though not Malays within the definition of the Malay Reservation Enactment are yet Malays within the interpretation in the Federation Agreement and the Kelantan Constitution, and I venture to submit that in the light of the changed circumstances now extent, Government might be prepared to give me a relief at this juncture by enabling the lands in the schedule attached to be registered in my name."

There is thus strong *prima facie* evidence adduced to support the defendants' contention that the plaintiff was at the material time not a Malay and a native of Kelantan and since this is based primarily on her own admission it requires in my view convincing evidence to rebut it. It is submitted by counsel for the plaintiff that her admission might have been on a point of law in ignorance of her actual legal status but the facts that the plaintiff's husband was a retired police officer and that as is shown in the letter dated 27 February 1950 (page 27 of A) he had consulted the State Secretary before he purchased the 13 lots at the auction and the passage in the plaintiff's letter dated 11 August 1954 quoted above are significant factors which have to be borne in mind when considering whether she was in

fact ignorant of her actual legal status. To bring her within the definition of a native of Kelantan in paragraph (b) of section 2 of the Land Enactment she had merely relied on her statutory declaration made on 20 December 1948 in which she had stated that her mother was a Kelantan Malay but when she gave evidence she had only said that her mother was born a Muslim in Kelantan and that her mother had not told her anything about her parents except that they were Muslims born in Kelantan. She had not even said that her mother was of the Malay race. This sort of evidence, particularly when considered in the light of the factors I referred to earlier, is not in my view sufficiently convincing to rebut her previous admission that she was not a Malay and a native of Kelantan. The same applies to PW2's bare assertion that the plaintiff is and the plaintiff's mother was a Malay.

Even assuming that she has by that sort of evidence established that she is a native of Kelantan she has not on that same evidence established herself as a Malay within the meaning of section 3(i) of the Malay Reservations Enactment. She had said that her father was a Pakistani Muslim and as in my view a person's race follows that of his father she is not of the Malay race.

The permission obtained dated 21 October 1957 (pages 54 and 55 of A) was one required under section 13A(i) of the Malay Reservations Enactment and it is submitted by counsel for the plaintiff that as the memorandum of transfer of the 10 lots had been registered in favour of the plaintiff without the sanction of the Ruler in Council under section 104(i) of the Kelantan Land Enactment being obtained plaintiff must be deemed to be a native of Kelantan and he refers the court to the judgment of Ali F.J. in *Hanisah's* case at page 215 which reads as follows: —

"On the other hand there is every reason to presume that the appellant is a Malay. I say this because the Register of Titles provide *prima facie* evidence that as owner of reservation land she is a Malay. At any rate on the affidavits as a whole there is nothing to justify a re-hearing."

The facts in the above-cited case are however different from the facts in this case and I am quite satisfied that had the permission under the Malay Reservations Enactment not been obtained the ten lots would not have been registered in the plaintiff's name.

As the decision on Issue No. 5 is dependent on my finding on Issue No. 1 it would be appropriate for me to consider it at this stage.

*Issue No. 5:*

Whether the agreement dated 12th June, 1949 contravenes section 12 Malay Reservations Enactment 1930 and is therefore null and void.

Section 12(i) of the Malay Reservations Enactment reads as follows: —

"12.(i) All dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void."

It is submitted by counsel for the plaintiff that the provision of the said section 12(i) had not been contravened in this case and as authority cites *Foo Say Lee* v. *Ooi Heng Wai*[2] the head-note of which reads as follows: —

"On August 19, 1958 the plaintiff entered into an agreement with the defendant for the purchase of a piece of land in Kota Bharu. On signing the agreement the plaintiff paid the defendant $1,500 and the balance of $3,500 was to be paid on the transfer of the land to the plaintiff. At the date of the agreement the land was held by a Malay. Condition 3 of the agreement provided that the sale was subject to the approval of the Kelantan government and the Ruler in Council. At the date of the writ the title of the land had been registered in the name of the defendant.

At the hearing in the court below the preliminary point was raised as to whether the said agreement was null and void under the Malay Reservations Enactment, 1930. The learned judge ruled that it was not null and void as it was an agreement to sell subject to the approval of the Kelantan government and the Ruler in Council. On appeal,

**Held,** dismissing the appeal: (1) only attempts to deal in reservation land contrary to the provisions of the Enactment would be null and void. Although the agreement between the parties could be regarded as an attempt to deal in reservation land, it was not an attempt to deal in the land contrary to the provisions of the Enactment;

(2) since section 13A(i) of the Enactment gives the power to the Ruler in Council in his discretion to approve a transfer of reservation land from a Malay to a non-Malay, it cannot be said that the agreement was an attempt to evade the provisions of the Enactment."

Azmi C.J. (Malaya) (as he then was) at page 49 said:

"With respect, in my view, this question could be solved this way. If you read section 12(i) carefully, it will be apparent that only attempts to deal in reservation land contrary to the provisions of the Enactment (the underlining is mine) would be null and void so that though the agreement between the two parties could be regarded as an attempt to deal in reservation land it is not in my view, an attempt to deal in the land contrary to the provisions of the Enactment.

My reasons are simply this. Section 13A(i) of the Enactment gives the power to His Highness the Ruler in Council in his discretion to approve a transfer of a right or interest of any Malay in reservation land to any person not being a Malay. Since the Enactment itself has provided a method of effecting a transfer of a reservation land from a Malay to a non-Malay, I am unable to come to the conclusion that any agreement to transfer such land by a method so provided by the Enactment itself, can be said to be contrary to the provisions of the Enactment and therefore null and void under section 12; nor could it be said that the agreement is an attempt to evade the provisions of the Enactment. (See judgment of Thomas C.J. in *Idris bin Haji Mohamed Amin* v. *Ng Ah Siew* [1935] M.L.J. 257 at page 258)."

This case however can be distinguished from the above cited case. As stated in paragraph 6 of the statement of claim the agreement between the first defendant and the plaintiff incorporated what had been agreed to earlier by the first defendant and the plaintiff's husband in relation to the purchase and registration of the 13 lots and in deciding this issue the whole of what had transpired relating to the 13 lots must be looked into. The 13 lots in this case which belonged to the estate of a deceased Malay had been bought at a public auction by the plaintiff's husband for her both of whom were not Malays and registered in the name of the first defendant who was a Malay and though the agreement by which the plaintiff agreed to transfer the 13 lots on approval of the Ruler in Council being obtained by itself, as in the above-cited case, may not be an attempt to evade the provision of the Malay Reservations Enactment, the transaction taken as a whole constituted in my view not merely an attempt to evade but an evasion of the provision of the Malay Reservations Enactment. I therefore find it null and void.

Having decided on these two issues I could dismiss the plaintiff's claim with costs but as this case may not end here I consider it proper before doing so to consider the other issues which have been raised.

*Issue No. 2:*

Were the 3 lots registered and held in the name of first defendant in trust for the plaintiff?

The first defendant himself had admitted that he held the 13 lots in trust for the plaintiff and on the assumption that the provision of the Malay Reservations Enactment had not been contravened I would decide this issue in the affirmative. It is submitted by counsel for the defendants that clause 4 of the agreement which enables the first defendant to retain the 13 lots on payment of $15,000 to the plaintiff and clause 6 thereof which provides for liquidated compensation of $15,000 to be paid by the first defendant to the plaintiff for any breach of the agreement would nullify the agreement as a trust instrument. It is however quite obvious that the two clauses had been included therein to meet the contingency of the approval of the Ruler in Council not being obtained and I am quite satisfied that the two clauses cannot operate to prevent the court from enforcing the trust by virtue of section 19 of the Specific Relief (Malay States) Ordinance, 1950, which reads as follows: —

"A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

*Issue No. 3:*

Was there a gift of the said three lots by the plaintiff to the first defendant for purposes of erecting a school?

The evidence regarding the gift given by the first defendant which has been corroborated by DW2 has been denied by the plaintiff and it is submitted by counsel for the plaintiff that in deciding this issue the court shall consider not so much the consistency of the evidence of the first defendant and DW2 but the improbability of the allegation and he has pointed out various matters which would tend to show its improbability. After considering all the evidence before me and the peculiar circumstances of this case I am satisfied that the gift had been made. The first defendant had not personally been benefitted at all by the whole transaction and I consider it highly improbable that had a gift not been made a substantial school would have been built on Lot 36. The first defendant appears to be a well-meaning and respectable person for had he wanted to be dishonest he could have disposed of for his own benefit not only the other ten lots bought at the auction but also the other twelve lots which the plaintiff's husband had earlier bought for her and registered in his name. Official acts are presumed to have been done properly and I am satisfied that the Assistant District Officer had cancelled the three lots with the agreement of the parties. Since the construction on Lot 36 had commenced in October 1957 I am quite satisfied that both the plaintiff and PW2 must have known that it was a school which was being constructed thereon when the transfer of the ten lots took place on 31 March 1958 and I consider that PW2's contention that he was then prepared to accept only the ten lots because he expected the other three lots to be transferred to his mother later on to be not reasonably true and that if a gift had not been made one would expect him or his mother to have raised the matter then and there. The evidence of the first defendant appears to me to be on the whole more reliable than that of the plaintiff and I also accept his contention that neither the plaintiff nor PW2 had objected to the construction of the school on Lot 36. It is true that he had not even notified the plaintiff that the school was being built but this in my view would be more consistent with his allegation that a gift had been made than with the plaintiff's contention that she had not made such a gift.

It is contended by counsel for the plaintiff that the gift had not been proved clearly and convincingly as required under section 30 of the Contracts (Malay States) Ordinance 1950 which provides that:

"Agreements, the meaning of which is not certain or capable of being made certain, are void."

I do not agree with this contention. The first defendant was 80 years old when he gave evidence and though there appears to be some discrepancies in his evidence I am quite satisfied that the gift was for the purpose of building a school and that the parties concerned knew that such a school need not necessarily be built by the first defendant himself. Again, though the lot numbers had not been specified when the plaintiff made the gift it is quite obvious that she had agreed to the gift of the three lots which the first defendant had in mind when he described their locality and cultivation.

It is also contended by counsel for the plaintiff that as the plaintiff had only made a gratuitous promise to donate the three lots it does not amount to a charitable gift and he refers the court to *Lee Eng Teh & Ors.* v. *Teh Thiang Seong & Anor.*[3] where the plaintiffs who claimed to be trustees and principal officers of a school in Klang had brought an action against the defendants for a declaration that the school was entitled to land in Klang and for an order that the land be transferred to three of the plaintiffs as trustees for the school alleging that the first defendant had agreed to donate the land to the school. At that time the first defendant was not the registered owner of the land but he was the managing director of the second defendant company who had purchased the land for development. The defendant company as such had not made any promise to donate any part of the land to the school. The school had a building committee of which the first defendant was chairman. This committee had collected funds and they had put up a school on part of the land. It was held that

"(2) the first defendant incurred no contractual liability by making a promise to donate the land for the building of the school and as the promise was a gratuitous one there was no question of any incompletely constituted trust having arisen; (3) the second defendants having allowed the school to be built on their land, must be deemed to hold such land subject to the equity that they will allow the school building to remain there indefinitely; but it is not the sort of equity on the basis of which in the absence of an unequivocal promise by the second defendant to make a charitable gift, the plaintiffs are entitled to the declaration they were asking for."

and Gill J. (as he then was) at page 44 said:

"The next question to be considered is whether the promise

made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the question to be considered is whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect voluntary trust."

The facts in the above-cited case however are different from those in this case where the three lots at the time of the gift were already registered in the name of the first defendant which in my view means that the gift had been completely constituted and the question of consideration therefore is irrelevant.

*Issue No. 4:*

Is the plaintiff estopped by conduct from claiming the three lots?

This issue arises on the assumption that for some reason or other the gift had not been validly made and is based on section 115 of the Evidence Ordinance which reads as follows: —

"115. When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and such person or his representative in interest to deny the truth of that thing."

Amended paragraph 10 of the amended statement of defence reads as follows: —

"10. The defendants aver that the plaintiff has no valid claim to any interest in the said lots 36, 843 and 845 and in the alternative the plaintiff is estopped by conduct from making any claim of interest in respect of the said 3 lots. Particulars of conduct being (i) consenting to deletion of the 3 lots from the transfer form and (ii) non objection to the construction of the school when she was fully aware of the commencement of the construction in October 1957."

I have accepted the defendants' evidence on those two particulars and all that I need do now to dispose of this issue is to quote the following passage from the judgment of Gill J. (as he then was) in *Lee Eng Teh's* case which appears at page 45:

"Applying the above principle to the present case, it is clear that the second defendants, having allowed the school to be built on their land, must be deemed to hold such land subject to the equity that they shall allow the school building to remain there indefinitely. This equity would be an effective answer to any attempt on their part to get back that part of their land on which they allowed the school to be built, but it is not the sort of equity on the basis of which, in the absence of an unequivocal promise by the second defendants to make a charitable gift, the plaintiffs are entitled to the declaration they are asking for. In the circumstances the claim as framed against the second defendants must also fail."

There has thus been established an equity in this case which would prevent the plaintiff from getting back that part of the land on which she had allowed the school to be built.

As indicated earlier I would now dismiss the plaintiff's claim with costs.

*Claim dismissed.*

Solicitors: *Wilson & Co.;*

[*Editorial Note:* No appeal had been lodged in this case.]

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## VICTORIA INSURANCE CO. LTD. v. AIK TEONG TRADING CO.

**[A.C.J. (Chang Min Tat J.) July 14, 1972]**

**[Penang — Civil Appeal No. 1 of 1971]**

*Insurance — Marine — Portion of cargo damaged by sea-water after having been off-loaded the ship — "Warehouse to warehouse" provision — Evidence Ordinance, 1950, s. 60.*

This was an appeal by the insurers from the decision of the learned magistrate, Penang, allowing the claim of the respondents/plaintiffs in respect of a policy of marine insurance covering a shipment of maize from Bangkok to Penang. The claim was for damage to a portion of the shipment and for survey fees in the total sum of $435.15.

The plaintiffs alleged that they were interested in the shipment, and that the bags were delivered to them two days after arrival of the carrier at Penang. On the day of the delivery, they found and notified the insurers' survey agents of the damage and the agents concerned carried out a survey, on the basis of which the claim was made.

The marine policy in question was issued in the name of Messrs Siam Ka Kao Co. Ltd. of Bangkok by the insurers through their agents in Bangkok. The insurers, for the consideration of the premium paid, undertook with the insured, their executors, administrators and assigns, to take upon themselves the burden of the insurance. The period of the insurance was from the loading aboard the ship "until the said ship or vessel shall be arrived at the port or place mentioned in the schedule hereto and the said goods and merchandise be there discharged and safely landed". The ship arrived in Penang on March 14, 1967. In the meantime, the plaintiffs had purchased the merchandise from the consignees and were given the invoice from Messrs Siam Ka Kao Co. Ltd., the policy of insurance and the bill of lading, all duly endorsed by the vendors on presentation and re-endorsed by the plaintiffs.

On arrival, the ship was anchored in the roadstead and the goods discharged into a lighter, engaged by the plaintiffs and the goods were delivered to the plaintiffs' warehouse on March 16, 1972. It was on that day that the plaintiffs noticed that some of the bags of maize were damaged.

**Held,** dismissing the appeal: (1) the evidence of the lighterman was sufficient to establish that the damage was caused by sea-water contaminating the shipment after the bags had been off-loaded the ship and were on their way in the lighter. The damage was caused when the lighter shipped water in the rough conditions it encountered and the sea-water splashed over the porous gunny bags. In the circumstances, there could be no claim against the carrier;

(2) on the facts, the damage was caused after the goods had left the ship and before arrival at the warehouse. The "warehouse to warehouse" provision applied within the issue raised in the pleading.

*Case referred to:-*

(1) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220, P.C.

CIVIL APPEAL.

*Leow Shin Fong* for the appellants.

*Oh Cheow Hong* for the respondents.